

BEFORE THE
PHYSICAL THERAPY BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

KEVIN RAE WALLACE
145 Camellia Way #22
Modesto, CA 95354

Case No. ID-2000-62700

OAH No. N2004070310

Respondent.

PROPOSED DECISION

On November 1, 2004, in Sacramento, California, Ann Elizabeth Sarli, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Robert C. Miller, Deputy Attorney General, represented complainant.

Respondent Kevin Rae Wallace represented himself.

Evidence was received, the record was closed and the matter was submitted on November 1, 2004.

FACTUAL FINDINGS

On February 23, 2004, complainant and petitioner Steven K. Hartzell, made and filed the Accusation in his official capacity as the Executive Officer of the Physical Therapy Board of California ("Board"), Department of Consumer Affairs.

2. Respondent timely filed a Request for Hearing pursuant to Government Code sections 11504 and 11509. The matters were set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

The Board issued Physical Therapy Assistant (PTA) License Number AT 5774 to Kevin Rae Wallace on March 28, 2000. The license was current at all times relevant herein.

Respondent was initially employed as a physical therapy assistant with Guardian Rehabilitation, located in Modesto, California. In approximately October of 2000, while he was still employed by Guardian Rehabilitation, respondent started a business, Myo-Dynamics Body-Work center. He is the sole employee of the business. He does not work with a licensed physical therapist.

In addition to his PTA license, respondent holds a BA in physical education, a certificate as a massage therapist and a personal training certificate. Respondent receives referrals from several physicians and from a chiropractor. The majority of respondent's clients are injured workers whose treatment is paid by worker's compensation insurance carriers.

Respondent maintains that he does not perform physical therapy services. He maintains that he provides only massage therapies and postural analysis as well as personal training services such as diet advice and exercise regimens.

The evidence is that respondent does hold himself out as a physical therapy assistant and that he does perform physical therapy in his business. Respondent uses the PTA designation on his business cards. He does not use the certified massage therapist (CMT) designation on his business cards. The business cards state that he performs myofascial release and neuromuscular therapy. He provides referring physicians with a pre-printed referral form listing his credentials as BA, PTA, and CPT. The referral form does not state that respondent is a CMT. The referral form is preprinted with the title "prescription form". It states "It is my [referring physician's] recommendation that [patient name] undergo the following adjunctive procedures: myofascial release, neuromuscular therapy, and therapeutic exercise." The referral form contains sections for the physician to insert the number of "sessions scheduled" and the "diagnosis".

Respondent's billing statements state PTA after his name. Respondent bills \$71.34 for one hour of treatment and \$180.99 for one hour of treatment and evaluation. He uses physical medicine codes for billing, which include code 99204 and 99214 (an evaluation and management code for physician use), code 97250 (myofascial release/soft tissue mobilization) and 97145 (therapeutic procedure additional 15 minutes).

8. Respondent's progress notes bear the legend "Therapist: Kevin Wallace, BA, PTA, CPT". The progress notes do not indicate that he is a certified massage therapist. He claims he uses the physical therapist assistant designation, not to hold himself out as an assistant physical therapist, but to give himself more credibility with doctors. He presented in evidence a letter he prepared, which he had signed by five physicians in the PRH Medical Group. The letter states that respondent did not represent himself to be a physical therapist, but did represent himself as a massage therapist trained in manual therapy techniques, including myofascial release and neuromuscular therapy. However, few of respondent's

patients were referred by the physicians who signed the letter. There is no evidence that the additional referring physicians believed they were making referrals for massage therapy rather than physical therapy. Moreover, the letter does not address whether the physicians believed they were referring their patients to a physical therapy assistant. Additionally, many of the physicians had referred patients specifically for “physical therapy”. In light of this evidence, respondent’s letter has little evidentiary weight.

9. Mark Mc Coy, a licensed physical therapist for the past twenty-three years, testified on behalf of complainant. He holds a BS in Health Science/Physical Therapy and is currently enrolled in the first year of a three to five year doctoral program in Transitional Physical Therapy at Pacific University. He has extensive experience as a physical therapist, as an owner and administrator of physical therapy clinics, and as an instructor and consultant.

10. Mr. Mc Coy distinguished between the scope of practice of a physical therapist and that of a physical therapy assistant. Physical therapists interpret referrals and conduct initial examinations including evaluation, diagnosis and prognosis. They develop and continuously modify treatment plans which are based on the initial examination or reexaminations, and which include physical therapy goals and outcomes. Physical therapists evaluate the patient treatment plans to determine whether a physical therapy assistant can deliver a service safely and effectively. Physical therapists reexamine and reassess patients in light of their progress and goals and revise plans as needed. They determine when it is appropriate to discharge a patient and when it is necessary to extend treatment.

Physical therapists perform therapeutic interventions that require immediate and continuous examination and evaluation throughout performance of the intervention. They may perform spinal and peripheral joint mobilization and manipulation and selective sharp debridement. All of these duties are performed exclusively by physical therapists and cannot be delegated to physical therapy assistants.

11. The scope of practice of a physical therapy assistant is limited, due to the limitations of their training. Physical therapy assistants may practice only under the supervision and direction of a physical therapist. They may perform physical therapy interventions selected by the supervising physical therapist. They may not evaluate, assess, diagnose, change treatment plans or discharge patients.

12. Mr. Mc Coy reviewed twenty-five to thirty of respondent’s patient charts to determine the scope of respondent’s practice. With only a couple of exceptions, the clients had work related injuries and were covered by worker’s compensation insurance. Several of the charts had referral slips from physicians requesting “physical therapy”. These preprinted referral forms are commonly used in physical therapy practices. One chart had a referral for “PT-Exercise” and a “PT Eval” box was checked on a preprinted form by the referring physician.

13. The patient charts reflected a considerable amount of evaluation and assessment. Respondent charged the patients' first visit as an evaluation. He based treatment plans upon his assessments. Respondent conducted "postural evaluations" in most cases. Progress notes to the referring doctors contained evaluative statements and summaries. The charts reflected that respondent routinely made recommendations to the referring physicians.

14. All of the evaluative, assessment and diagnostic activity respondent conducted was outside of the scope of a physical therapy assistant's practice, even while under the supervision of a physical therapist.

15. Mr. Mc Coy selected twenty-two patient charts, which were introduced in evidence. Mr. Mc Coy used several of the charts at hearing to illustrate the assessments and treatments respondent typically practiced. Patient Glenn A. was referred for 12 sessions of myofascial release, neuromuscular therapy and therapeutic exercise. He had a diagnosis of status post disectomy x 2, sciatica and myofascial pain. Respondent determined that the patient was an appropriate candidate for therapy, conducted a postural analysis, opined that there was possible nerve entrapment, and began a treatment plan to release restrictions and fix shoulder rotation. Respondent proceeded to assess whether the patient's muscles were properly firing and to recommend pool therapy. These activities are all evaluative and assessments and are not within the scope of a physical therapist assistant, even one who is supervised by a physical therapist.

16. Respondent treated patient Glenn A. with treatments to release hamstring muscles, stimulate muscles and stretch muscles. These therapies are within the scope of a physical therapist assistant's practice, but only if he is supervised and directed by a physical therapist. If too much force is applied during these treatments, there is considerable risk of causing nerve entrapment or destabilizing an injured patient, particularly a post surgical patient. Respondent treated this patient's laminar groove and deep fibrotic tissue to achieve proper functioning of facet joints. This treatment does not fall within the scope of practice of a physical therapy assistant.

17. Likewise, with patient Manual R., respondent conducted evaluations and assessments and reported his conclusions to the referring physician. Respondent's treatments fell outside the scope of a physical therapist assistant, in that he "released tissues", assessed ischemic condition, released trigger points, "lessened the outside rotation of the shoulder" and directed the patient in an exercise regimen.

18. Patient Billy H. was referred for right side cervical thoracic myofascial pain. Respondent again practiced outside the scope of a physical therapy assistant by evaluating and assessing the patient, creating a treatment plan, and by making recommendations. The patient chart revealed that respondent used muscle energy techniques to move the vertebrae in the cervical area in an effort to "realign the muscle tissue". Mr. Mc Coy opined that this is a very dangerous technique to employ in the cervical area because of the force involved. The patient was fifty-six years old and the patient had not been assessed for co morbidity problems. The vertebral artery can be compromised by co-morbidity problems or by

medications and too much force in the technique could sever an artery and cause death. Energy techniques such as this are not within the scope of practice of a physical therapy assistant.

19. Mr. Mc Coy testified persuasively that the remaining twenty patient charts reflect the same patterns of assessment, evaluation, diagnosis and treatment. Respondent's activities with these patients were outside the scope of practice of a physical therapy assistant.

20. Respondent testified that he does not use his physical therapist assistant license. He maintained that he only used the designation PTA to "gain credibility with doctors." He stated that he wanted doctors to know that he understood and spoke their language. He testified that he had earned the PTA license and was thus entitled to use it. Respondent maintained that he is a certified massage therapist and physical trainer and that the work he does is "under" his massage therapist certification. He alleged that the field of physical therapy does not have a monopoly on the therapeutic techniques he employed and that they may be properly employed by a massage therapist. He conceded that his practice would be outside the scope of a physical therapist assistant if that was the license under which he was practicing.

21. Respondent produced evidence intended to show that massage therapists could appropriately use the techniques and procedures he used in his practice. This evidence was not persuasive, nor was it particularly relevant. Whether respondent could legally conduct his practice in this manner as a massage therapist was not a relevant inquiry, because the evidence was clear and convincing that respondent was holding himself out as a physical therapist assistant and was conducting his practice as if it were a physical therapy practice.

22. The parties were advised that the Administrative Law Judge would take evidence relating to the factors set forth in *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32. The parties were advised that these factors would be considered in determining the reasonableness of costs. These factors include; whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate to the alleged misconduct.

Complainant established that the reasonable costs of investigation and prosecution of this matter were \$4,366. Complainant established that the scope of the investigation was appropriate to the alleged misconduct.

Respondent testified that he is in a "tight situation". He has a house payment and a child. He did not try to settle the matter with the complainant, even though the prayer in the Accusation was limited to a request for public reproof and costs. He did not settle the matter because he believes he was properly functioning as a massage therapist and not a physical therapy assistant.

LEGAL CONCLUSIONS

Cause exists, by clear and convincing evidence, for disciplinary action under Business and Professions Code section 2660, subdivision (h) in that while a licensed physical therapist assistant, respondent committed gross negligence in his practice, by practicing without the supervision and direction of a licensed physical therapist.

This conclusion is based on the Factual Findings and on the Legal Conclusions.

Cause exists, by clear and convincing evidence, for disciplinary action under Business and Professions Code section 2660, subdivision (i) in that while a licensed physical therapist assistant, respondent committed fraudulent and dishonest acts substantially related to the qualifications, functions and duties of a physical therapist assistant, in that he represented his practice as a physical therapy practice when he had not secured necessary supervision and while he practice outside the scope of his licensure.

This conclusion is based on the Factual Findings and on the Legal Conclusions.

Cause exists, by clear and convincing evidence, for disciplinary action under Business and Professions Code section 2630, in that while a licensed physical therapist assistant, respondent represented his practice as a physical therapy practice when he had not secured necessary supervision and while he practice outside the scope of his licensure.

This conclusion is based on the Factual Findings and on the Legal Conclusions.

4. Pursuant to Business and Professions Code section 2661.5, the Administrative Law Judge may direct any licensee found guilty of unprofessional conduct to pay to the Board a sum not to exceed the actual and reasonable costs of investigation and prosecution of the case. As set forth in Factual Finding 22, the actual and reasonable costs of investigating and prosecuting this matter have been established as \$4,366. Respondent did not establish that there was cause to reduce costs.

5. The Accusation contains a Prayer for issuance of a Public Reproval under Business and Professions Code section 495. Thus, respondent was given notice that Public Reproval and payment of costs was the extent of the discipline that would be imposed. The Administrative Law Judge is limited by the pleadings and due process notice requirements to limit any discipline to a Public Reproval or lesser discipline.¹

ORDER

A Public Reproval shall issue against Physical Therapy Assistant license AT 5774 issued to Kevin Rae Wallace.

Respondent shall reimburse the Board of Pharmacy the sum of \$4,366, within thirty days of the effective date of this Decision. The board may in its discretion permit respondent to make installment payments.

Dated: November 24, 2004

Original Signed By: _____
ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings

¹The Boards' Disciplinary Guidelines state in pertinent part: The Board is authorized by Section 495 of the Business and Professions Code to publicly reprove a physical therapist assistant for a violation of the Physical Therapy Practice Act. The issuance of public reproval as part of a disciplinary order may be considered when the following circumstances exist:

1. The offense is an isolated incident.
2. Sufficient time has elapsed since the offense without further violations that would that indicate a recurrence is unlikely.
3. The respondent has admitted to the offense.
4. The respondent has indicated remorse.
5. There has not been prior discipline for a similar violation.

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PHYSICAL THERAPY BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the First Amended)
Amended Against:)
KEVEN RAE WALLACE.)
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_____)

Case #: 1D 2000 62700

OAH No.: N2004070310

The foregoing Proposed Decision, in case number 1D 2000 62700, is hereby adopted by the Physical Therapy Board, Department of Consumer Affairs, State of California.

This decision shall become effective on the 7th day of March, 2005.

It is so ordered this February 4, 2005 .

Original Signed By:
Donald A. Chu, P.T., President
Physical Therapy Board
of California